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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 1267

THEATRES SERVICE COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION
and DANCE FREIGHT LINES, INC., Appellees.

**On Appeal from the United States District Court for the Northern District of Georgia.**

## MOTION TO AFFIRM

PAUL M. DANIELL

BILL R. DAVIS

*Attorneys for Appellee,*
DANCE FREIGHT LINES, INC.

*Of Counsel:*
WATKINS, DANIELL, DAVIS & SERBY
Suite 1600
First Federal Building
Atlanta, Georgia 30303

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**TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:**

Pursuant to Rule 16(1c) of the Rules of this Court, Dance Freight Lines, Inc., appellee, respectfully moves the Court to affirm the judgment of the District Court.

## I.

## STATEMENT OF THE CASE

This is an appeal from a final judgment of the United States District Court for the Northern District of Georgia (Jurisdictional Statement, pp. 1(a)–7(a)), sustaining a Decision and Order of the Interstate Commerce Commission (Jurisdictional Statement, pp. 8(a), 9(a)).

On August 27, 1965 appellant filed an application for a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of magazines, books, and periodicals, between points and over routes which it already had authority to serve, the purpose of the application being to modify the existing certificate so as to eliminate the requirement that the magazines, books, and periodicals be consigned to or from magazine dealers or distributors. On September 2, 1965 Dance Freight Lines, Inc., appellee herein, filed a formal complaint with the Commission and thereupon the Interstate Commerce Commission instituted a proceeding in Docket No. MC-C-4892 to determine whether appellant, a motor common carrier operating under certificate of public convenience and necessity issued in Docket No. MC-65697 (Sub-No. 2), was and had been transporting "books" from Kingsport, Tennessee which are not authorized by said certificate. The application proceeding in Docket No. MC-65697 (Sub-No. 34) and the complaint proceeding in Docket No. MC-C-4892 were consolidated for hearing and decision. The Examiner issued his Report and Recommended Order (Jurisdictional Statement pp. 10(a)–28(a)), recommending that a cease and desist order be issued in Docket No. MC-C-4892 and that the application in Docket No. MC-65697 (Sub-No. 34) be denied. The Commission, Division 1, issued its Decision and Order (Jurisdictional Statement, pp. 8(a), 9(a)) upholding the Examiner's Report and Recommended Order.

Appellant filed its complaint in the United States District Court for the Northern District of Georgia seeking to have set aside the Order of the Commission in Docket No. MC-C-4892.

The certificate in question authorizes the transportation of:

> "****magazines, books,* and *periodicals* consigned to or from magazine dealers and distributors,"

The Examiner and the Commission, using the aid of the *Encyclopedic Dictionary of Business*, Prentiss-Hall, Inc., New York, 1952, interpreted the certificate and held that the terms "dealers" and "distributors" should be defined according to their ordinary commercial usage, and that, as used in the certificate, a "dealer" is one who deals in magazines at the retail level, and a "distributor" is one who acts as a middleman in the marketing of goods by purchasing them from manufacturers or producers and selling them generally to various dealers who in turn deal with the ultimate consumer (Jurisdictional Statement, pp. 15(a), 16(a)). They then applied these interpretations to the business activities of the consignor and consignees involved and determined that they were neither dealers nor distributors of magazines (Jurisdictional Statement, pp. 13(a)–17(a)).

The three Judge District Court unanimously sustained the Commission Decision.

## II.

## ARGUMENT

It is clear that the Commission has the power and discretion to construe and interpret the scope of a certificate which it has issued and such construction and interpretation will not be set aside unless clearly erroneous. *U.S.A.C. Transport v. U.S.*, 235 F. Supp. 689, aff'd. 380 U.S. 450; *Andrew G. Nelson, Inc. v. U.S.*, 355 U.S. 554, 558; *J. B. Acton, Inc. v. U.S.*, 221 F. Sypp. 174, aff'd. *per curiam*, 84 S. Ct. 1133. The District Court

undertook to examine the Commission's ruling with respect to the consignor and the consignees, and concluded that such interpretations were proper and that their application was based on substantial evidence (Jurisdictional Statement, pp. 3(a)–6(a)). Appellee therefore respectfully submits that there is no reason for further review by this Honorable Court.

1—Appellant's first contention is that the interpretation placed on its certificate is arbitrary. However, from the inception of this case appellant has attempted to apply strained and tortured interpretations to the terms of the certificate and in effect has taken the position that any one who "passes out" magazines is a magazine "distributor", and that any one who ever has occasion to "sell" a magazine is a magazine "dealer".[1] In fact, at the hearing in the administrative proceeding appellant's witness clearly admitted that he makes no distinction between the terms "ships" and "distributes".[2] In essence, appellant's contention is that the *literal* definition of the subject terms used in its certificate should be applied.[3] Significantly, appellant consistently has argued that the definition of the terms as contained in *Webster's Third New International Dictionary*, must govern, and not the definitions as contained in the dictionary used by the Examiner and the Commission. Thus, appellant's argument is essentially, that the *wrong dictionary* was used. Appellant further argues that the Commission's interpretation does not conform strictly to the evidence presented in the proceeding. But all of these arguments overlook the fact that the Commission, in interpretating its own certificates, is not confined to the evidence presented, and can proceed on an independent basis, and can apply any reasonable standard as long as there is a rational basis in support. *Simpson v. U.S.*, 200 F. Supp. 372, aff'd. *per curiam*, 369 U.S. 526. It has been held even that the Commission can arrive at its

[1] Tr. 223-225; 235–241; 254–257. ("Tr" refers to the transcript of record in the adminstrative proceeding.)

[2] Tr. 254–257.

[3] It is true that appellant, in its Jurisdictional Statement, uses the word "ordinary" definition, but this word has been used consistently by appellant to mean "literal". See Appellant's Exceptions to Examiner's Report, page 15; Jurisdictional Statement pages 10-11 Footnote 8.

interpretation through the application of its own "cumulative expertise". *J. B. Acton, Inc. v. U.S.*, supra; *USAC Transport v. U.S.*, supra.

2—Appellant's next contention is that it was prejudiced by a consideration of the evidence presented in the application proceeding which was consolidated with the complaint proceeding. In the first place, at the trial before the Administrative Agency the appellant attempted to use its supporting witnesses who testified in the application proceeding, to support its interpretation and to use their testimony as evidence in opposition to the complaint case.[4] Moreover, the Commission is not confined to a record of a particular proceeding, *Simpson v. U.S.*, supra, at page 377, and especially should this be true where the proceedings, as here, involve closely related matters and were consolidated for hearing and decision. *U.S. v. Pierce Auto Freight Lines*, 327 U. S. 515.

3—Appellant next contends that it was prejudiced by the shifting of the burden from Dance, the complainant in the Administrative Proceeding, to appellant. In this connection it is argued that the District Court ignored the "lack of evidence" in support of the Commission's findings with respect to the business activities of the consignor and consignees and that the findings of the Agency are not supported by the evidence. However, since there is evidence in the record relative to such business activities appellant's real complaint must be deemed to be with the weight given the evidence by the Agency, which, it is submitted, the District Court properly refused to evaluate. *Simpson v. U.S.*, supra; *Malone Freight Line v. U.S.*, 107 F. Supp. 949. Nor does the fact that one party has the burden of proof mean that such party has to introduce *all* the proof in the case, which is the essence of appellant's argument. The Commission considered all the evidence of record and concluded that complainant, appellee herein, had carried its

[4] Intervenor's Exhibit No. 1.

burden. Accordingly, the District Court held that such conclusions were supportable by the evidence and, therefore, were not erroneous or arbitrary.

## III.

## CONCLUSION

In view of the above, appellee respectfully submits that no substantial question is presented by this appeal and that, therefore, the judgment of the District Court below should be affirmed.

Respectfully submitted,

PAUL M. DANIELL

BILL R. DAVIS

*Attorneys for Appellee,*

DANCE FREIGHT LINES, INC.

*Of Counsel:*
WATKINS, DANIELL, DAVIS & SERBY
Suite 1600
First Federal Building
Atlanta, Georgia 30303